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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN CLAY, Defendant and Appellant.	A104100 (Contra Costa County Super. Ct. No. 031051-6)

Defendant John Clay was charged with possession of a controlled substance for sale (Health & Saf. Code, § 11378) and with carrying a dirk or dagger (Pen. Code, § 12020, subd. (a)(4)). He appeals from a judgment on his plea of no contest to possession of a controlled substance. (Health & Saf. Code, § 11377.)

We affirm.

FACTS

As the judgment was entered on a negotiated plea, we take the facts from the transcript of the preliminary hearing.

On November 29, 2002, at approximately 8:40 p.m., Police Officer Jeff Palmieri was driving a marked police car on 23rd Street, near Market Avenue, in San Pablo. Defendant, riding a bicycle, darted into his lane, forcing the officer to brake to avoid hitting him. The officer turned on his emergency lights, intending to stop defendant for entering traffic unsafely. Defendant immediately pulled over onto the sidewalk. He told the officer that he was late picking up his son at BART. He thought he might have a

warrant, and asked for a break because he was late and really needed to go. Defendant was unable to produce any identification. He told the officer that he recognized him. They had an acquaintance in common.

Officer Palmieri thought the situation was odd because he couldn't see how defendant could pick up and transport his son on a bicycle. Defendant also appeared more nervous than most people seem to be when stopped by the police—his voice would quiver at times and he was speaking fast. The officer called in defendant's name to check on warrants. He also called for a backup unit, explaining that the combination of defendant's nervousness and the possibility that there was a warrant out on him caused him concern that defendant might have weapons or narcotics on him. The officer also noted that over the course of his 17-year career, he had arrested and been involved with people with weapons in the same area.

After the backup unit arrived, Officer Palmieri conducted a patsearch. He felt something that felt like a bullet in defendant's right pocket area. The officer asked defendant if he had bullets in his pocket. Defendant answered, "Whatever I have in there is something I just found." This answer heightened the officer's suspicion that defendant might have a firearm on his person. The officer retrieved the suspicious item, which proved to be a plastic vial with small marking numbers on it and a white residue inside it that the officer thought might be consistent with either methamphetamine or cocaine.

Officer Palmieri continued the patsearch, and found another vial in defendant's left pocket. This vial also contained white residue. He felt what seemed to be a 10-inch metal object in defendant's coat pocket. Defendant said that it was a knife, and it proved to be a replica of a samurai-type sword within a sheath. At that point, the officer handcuffed defendant. He searched defendant's inside pockets where he found a first aid bag containing a small portable scale, 21 small plastic baggies and a pager. One baggie contained what appeared to be crystal methamphetamine. Officer Palmieri arrested defendant.

The officer transported defendant to the police station, where defendant, after waiving his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), told the officer

that the white substance was methamphetamine. Defendant explained that he had purchased the methamphetamine earlier that day, and was selling it. Customers would page him, and he would deliver the drug to them on his bicycle. The substance in the baggie tested positively for methamphetamine.

DISCUSSION

Defendant's sole appellate contention is that the trial court erred in denying his motion to suppress evidence of the methamphetamine seized from his pocket. He contends that his Fourth Amendment right to be free from unreasonable searches and seizures was violated by the patdown search, because Officer Palmieri lacked cause to believe that defendant was armed and dangerous. He contends, further, that even if Officer Palmieri was entitled to conduct the patdown search for weapons, he was not entitled to seize the baggies and methamphetamine from defendant's inside coat pocket.

The Patsearch

An appellate court reviewing the denial of a motion to suppress defers to the trial court's factual findings where supported by substantial evidence, but exercises its independent judgment to determine whether, on the facts found, the search and seizure was reasonable under Fourth Amendment standards. (*People v. Loewen* (1983) 35 Cal.3d 117, 123; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

An officer has the authority to conduct a reasonable search for weapons when the officer has reason to believe a suspect is armed and dangerous, regardless of whether the officer has probable cause to arrest the individual for a crime. (*Terry v. Ohio* (1968) 392 U.S. 1, 27; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.) "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover

weapons which might be used to assault him." (*Terry v. Ohio, supra*, at p. 30.) The officer must be able to point to specific and articulable facts, together with rational inferences therefrom, that reasonably support a suspicion the suspect is armed and dangerous. (*People v. Dickey* (1994) 21 Cal.App.4th 952, 956.)

Defendant argues that Officer Palmieri did not articulate sufficient facts, or articulate them with enough specificity, to justify a suspicion that defendant was armed and dangerous. He asserts that a search is not justified by the mere fact that an individual appears to be nervous, or that he has been stopped for a traffic violation. Defendant complains that the officer never confirmed that defendant in fact had a warrant, and did not know what the warrant was for. According to defendant, the officer's prior experiences in the area could not justify the search as those experiences were not stated with any specificity. Finally, defendant claims that the search was not justified because, by the time it was conducted, the backup unit had arrived, arguing that it was not reasonable to believe that defendant would take aggressive action when he was outnumbered by the police.

We disagree. Although the officer did not articulate the specific crimes he had investigated in the area, his testimony, in essence, was that it was a high-crime area where offenders were known to carry weapons. It was nighttime. Defendant told an improbable story about retrieving his son from BART. Defendant appeared to be unusually nervous and asked for a "break," which, together with his improbable explanation of his activities, suggested that he was engaged in illegal activity. Defendant's assertion that he might have a warrant meant that he had been involved in illegal activity in the past. By this point, the officer had reason to believe that defendant was involved in criminal activity more serious than a traffic violation, and was involved in such activity in an area the officer knew armed criminals to have been in the past. These facts, collectively, justified a belief that defendant might be armed. Finally, that the police may outnumber an armed man does not mean that he poses no danger to them.

Defendant cites *People v. Dickey*, *supra,* 21 Cal.App.4th 952. In *Dickey*, the defendant had stopped his car on a one-lane dirt road. The police justified a patsearch of

his person on the facts that he appeared to make furtive movements in the driver's seat and had no identification or proof of registration. The police verified that the car was registered to the defendant. He would not consent to a search of the car, but did consent to a search of his backpack, which revealed a toothbrush and a canister of baking soda that the defendant claimed he used for brushing his teeth, but the officer believed to be a cutting agent for narcotics. The defendant was nervous and sweating despite the fact that it was a cool day. (*Id.* at pp. 954-955.) The court concluded that none of these considerations, considered singly or in combination, would lead an officer reasonably to believe in the possibility that the defendant had a weapon that might be used against him. (*Id*. at p. 956.) Here, in contrast, defendant was in a high-crime area, had in fact committed an offense and told the officer he had a warrant out against him. The holding in *Dickey* does not require a similar holding here.

It also is not persuasive that other cases, such as *People v. Limon* (1993) 17 Cal.App.4th 524 or *In re Frank V*. (1991) 233 Cal.App.3d 1232, justified patsearches on other, arguably more compelling, facts than those articulated by Officer Palmieri. Each case must be decided on its own facts, and we conclude that the facts here justified a patsearch for weapons.

The Intrusion into Defendant's Pockets

Defendant contends that Officer Palmieri was not justified in removing the first vial of methamphetamine from his pants pocket, as the officer knew that it was not itself a weapon. Defendant also contends that the officer had no right to ask defendant to identify the object. We need not and do not address these contentions as we find that evidence of the methamphetamine was admissible under the "inevitable discovery doctrine."[1]

"Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United

[1] The prosecution did not rely on the doctrine in the trial court. It is settled, however, that it may be raised for the first time on appeal. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 137-139.)

States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' " (*People v. Robles* (2000) 23 Cal.4th 789, 800, citing *Murray v. United States* (1988) 487 U.S. 533, 539.)

We have concluded that the officer was entitled to patsearch defendant for weapons. The officer, patting down defendant's jacket, felt what appeared to be a 10-inch metal object. The size and shape of the object suggested that it was a weapon, and defendant volunteered that it was a knife. The officer was entitled to retrieve it. (*Terry v. Ohio, supra,* 392 U.S. at pp. 29-30.) It is against the law to carry a dirk or dagger concealed upon the person. (Pen. Code, § 12020, subd. (a)(4).) Officer Palmieri, therefore, was entitled to arrest defendant for carrying the knife, and to search defendant for weapons and evidence within his reach as a search incident to a lawful arrest. (*Chimel v. California* (1969) 395 U.S. 752, 763.) The discovery of the methamphetamine was inevitable.[2]

CONCLUSION

The judgment is affirmed.

[2] As we find that Officer Palmieri would have arrested defendant for carrying a dirk or dagger concealed on his person, we do not reach defendant's claims that the officer would not have arrested him on the traffic violation or for failing to produce identification.

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STEIN, Acting P.J.

We concur:

_____
SWAGER, J.

_____
MARGULIES, J.